to annul the contract, but to consider further performance on his part unnecessary because the other party has not done that upon which such performance was conditioned. All rights which accrued before breach remain in full force and full remedy may be had by the injured party in a contract action. The question in this class, then, is whether the party may waive his contract action for one in quasi. Unquestionably the quasi-contractual action is borrowed from the Roman Law, Pothier on Obligations, Vol. II, 328, where in connection with express contracts it was allowed only where there was a mistake in the inception of the contract, or an immoral or illegal contract, or where there was performance on one side only of a contract of exchange, Ledlie's Sohm's Institutes 423–427, the theory governing the last case being that the promise alone of the defendant was no consideration and that the latter was, therefore, enriched without giving anything in return. Ledlie's Sohm's Institutes 391. The rapid extension of the field of this action in the common law is probably accounted for by the fact that in the competition between law and equity it proved a most valuable instrument for applying equitable remedies under legal guise. Kerly's History of Equity 86; 2 Harv. Law Rev. 66, 69. There was no reason for the law to give a quasi-contractual action where the remedy at law was adequate, which was admittedly the case where an express contract existed. The argument that the quasi-contractual action is more just is seriously questioned. Without abandoning the theory of contracts entirely, it is hard to see how the law can say that as between the parties the contract it implies is more just than the one they make for themselves.

THE POSITION OF AN INNOCENT PURCHASER IN EQUITY.—When one has an equity charged upon an estate he may have his equitable rights enforced against a purchaser who takes legal title with notice of the existing charge upon the estate. But in the case of a purchaser for value without such notice there is another party who has been defrauded and whose conscience is clear; and between these two conflicting equities the fact that one is coupled with legal title is decisive. *Townsend* v. *Little* (1883) 109 U. S. 504, 511. Though this rule arose from a consideration of both elements, *Boone* v. *Chiles* (1836) 10 Pet. 177, 210; *German etc. Soc.* v. *De Lashmutt* (1895) 67 Fed. 399, the earlier cases were prone to ascribe as a reason for refusing to act in such cases either the sole fact that equity had no call on the conscience of the defendant, *Jerrard* v. *Saunders* (1794) 2 Ves. Jr. 457, or the sole fact that equity should protect a legal title. *Bassett* v. *Nosworthy* (1673) Finch 102. By giving undue preference to the latter element some courts seem to have reached the conclusion that this defense cannot operate in favor of the purchaser of a mere equitable title since there is not the necessity of protecting a legal title and a prior equity must be considered superior to a later one. *Briscoe* v. *Ashby* (Va. 1874) 24 Grat. 454. In reason, however, the rule in such cases should be a logical counterpart of the rule with regard to purchasers at law, cf. *Colyer* v. *Finch* (1856) 5 H. L. C. 905, 920; *Town of St. Johnsbury* v. *Merrill* (1882) 55 Vt. 165, viz., that the claims of both parties should be weighed in each case, and that the point of priority in time should govern only in cases where the equities are otherwise equal. *Rice* v. *Rice* (1853)

2 Drew. 73; *Bailey* v. *Greenleaf* (1822) 7 Wheat. 46, 57; *Company* v. *Daugherty* (1900) 62 Ohio St. 586. Unfortunately the opinions in which this doctrine is announced fail to lay down general principles for the determination of the respective merits of various claims. This seems to have created the belief that the particular cases which apply this rule have merely formulated exceptions to the doctrine that between equities the prior shall prevail. A recent Virginia case well illustrates this. A cestui sought to have her trustee's sale set aside on the ground of fraud and the lands charged in the hands of a subsequent purchaser for value without notice of a subsequently created equity of redemption. The majority, resting upon the ground of priority and not being able to find that any of the "exceptions" existed, decided in the plaintiff's favor, while the minority, laying down the doctrine as in *Rice* v. *Rice*, etc., supra, find a stronger equity in favor of the defendant from slight and imputed negligence of the plaintiff. *Wasserman* v. *Metzger* (Va. 1906) 54 S. E. 893.

Of course if there is gross negligence or fraud upon the part of a prior claimant which renders possible the imposition of the subsequent fraud an equitable estoppel is found, *McNeil* v. *The Bank* (1871) 46 N. Y. 325; *Briscoe* v. *Ashby*, supra; *Safter* v. *The Bank* (1880) 54 Cal. 140; *Farrand* v. *The Co.* (1887) L. R. 40 Ch. Div. 182. But these and like questions arising extrinsically from the parties' conduct in obtaining their claims are not so difficult of determination as the question, how far will equity recognize one claim as superior to another from the intrinsic nature of the claimant's appeal to its jurisdiction? Equity will grant preference to the party who calls for the legal title as a result of its cognizance. *Lamar's Ex'rs* v. *Hale* (1884) 79 Va. 147. This, on the ground that such a party's position is not, in the eyes of equity, far different from that of one who has equal equity plus legal title, shows that equity does consider such a claim to its interference superior, in its intrinsic nature, to others. But whether or no superior weight should be given to an "equitable estate" when in conflict with a mere "equity" is not so readily determinable on authority.

An equitable estate or interest is held to be a real beneficial interest in the subject thereof itself which is property or so analagous thereto that it will be treated as a vested interest wherever possible by courts of equity. *St. John* v. *Spaulding* (1873) 1 De G., J. & S. 149, 167—considering a cestui's interest in equity; *Daggett* v. *Rankin* (1866) 31 Cal. 321—considering the interest of an equitable mortgagee; 2 Pomeroy § 684. This can only mean that such interests are regarded in equity as conferring the full rights and obligations of a vested legal estate except when such interests come in conflict with a legal estate. On the other hand we find a court of equity refusing to apply a residuary clause in the New York Statute of limitation, § 388, to an action for the cancellation of a fraudulent issue of town bonds, and barring the action in a shorter period. This decision is justified by holding that although the section undoubtedly applied to all other classes of equitable actions (see *Gilmore* v. *Ham* (1894) 142 N. Y. 1) it could not apply to mere equities depending for their existence and continuation upon the court's belief that the claimant had been and was inequitably situated. *Calhoun* v.

Maillard (1890) 121 N. Y. 69. Moreover equity acts with more hesitation and greater care in favor of such a claim than on any other occasion, *Basset* v. *The Co.* (1867) 47 N. H. 426. Evidently, then, equitable interests are considered superior to mere equities, and it is inevitable that the leading case so deciding in a conflict between the two claims, *Phillips* v. *Phillips* (1861) 4 De G., F. & J. 208, 218, should be found fully sustained in 2 Pomeroy, Eq. Jur. § 775. Thus the decision in the Virginia case could only be reached in accordance with true principles by pointing out that the plaintiff was seeking to follow a trust *res*, as appears by the decree of the lower court (and see 3 Lewin on Trusts p. 1057, § 11, Am. Ed. of 1888 and *Cave* v. *Cave* (1879) L. R. 15 Ch. Div. 639) and that both parties had therefore equities of the same nature, i. e. equitable estates, neither of which was acquired under such circumstances as to create an equitable estoppel. For the position that the defense of bona fide purchaser for value has no application when the estate purchased is an equitable one is unsound.

LIABILITY OF MUNICIPALITY FOR INJURY BY ITS VESSELS UPON NAVIGABLE WATERS.—The clearly settled doctrine that a municipality is not liable for negligence connected with the operation of its fire departments is beyond doubt to be placed upon the general ground that protection from fire is a function involving public interests. By the majority of cases the explanation given is that the maintenance and operation of fire departments is provided by the city not in its ordinary corporate capacity but as a part of the State government. If the municipality is acting in the capacity of a governmental agency it cannot be held for negligence, since those guilty of the lack of care were not its servants, but those of the State, which cannot be sued for lack of a forum. This explanation is unassailable with regard to fire service, if the test of the governmental capacity in that respect is the fact that the city acts "in obedience to an act of the legislature * * * in pursuance of a duty imposed by law," *Hafford* v. *New Bedford* (Mass. 1860) 16 Gray 297, or that the act is one "from which the city, as a corporation, derives no benefit or advantage." *Gillespie* v. *Lincoln* (1892) 35 Neb. 34. But a more scientific test seems to be furnished by the question, whether the function is in fact one of general state government. *Jewett* v. *City of New Haven* (1871) 38 Conn. 368. Under this criterion it is much less clear that the city operates fire departments as a state agent, the duty of the state to protect from fire being by no means well established. Apparently influenced by this consideration certain courts have inclined to hold that fire protection is a local function, *State* v. *Denny* (1888) 118 Ind. 449, 470; cf. *State* v. *Moores* (1895) 55 Neb. 480, and to place the exemption of municipalities from liability upon the ground of public policy. *Wilcox* v. *Chicago* (1883) 107 Ill. 334. However, the view that fire service is a state function is too well established to be generally attacked. *Tislin* v. *Boston* (1870) 104 Mass. 87; *Dodge* v. *Granger* (1892) 17 R. I. 664; *Burrill* v. *Augusta* (1886) 78 Me. 118; *Hayes* v. *Oshkosh* (1873) 33 Wis. 314.

It is interesting to note the application of these two views upon liability for injury caused by a municipality's vessels upon navigable waters,